

THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE: WASHINGTON MUTUAL
MORTGAGE BACKED SECURITIES
LITIGATION,

This Document Relates to: ALL CASES

Master Case No. 2:09-cv-00037-MJP

**PLAINTIFFS' EXPEDITED MOTION
AND MEMORANDUM TO AMEND
SCHEDULING ORDER**

**NOTED ON MOTION CALENDAR:
December 16, 2011**

ORAL ARGUMENT REQUESTED

Plaintiffs' Expedited Motion to Amend Scheduling Order
Case No. C09-037-MJP

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. 206.682.5600 • FAX 206.682.2992

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Lead Plaintiff Doral Bank of Puerto Rico, Lead Plaintiff Policemen's Annuity and Benefit Fund of the City of Chicago and Named Plaintiff Boilermakers National Annuity Trust ("Plaintiffs") respectfully submit this motion for amendment of the October 29, 2010 scheduling order (ECF No. 207) (the "Scheduling Order"), as amended by the Court on September 6, 2011 (ECF No. 335).

I. INTRODUCTION

The Court's October 29, 2010 Scheduling Order required that document production be substantially complete by July 29, 2011. As of July 29, 2011, Defendants and JPMorgan Chase Bank, N.A. ("JPMC") had produced approximately 217,000 documents, exclusive of those documents produced to the Permanent Subcommittee on Investigations during their investigation of Washington Mutual Bank ("WMB").¹ On July 29, 2011, Defendants moved this Court to extend the deadline for production of documents to September 30, 2011, and to move the close of fact discovery from December 1, 2011 to January 17, 2012. This Court granted, in part, Defendants' motion, setting September 12, 2011 as the date for "substantial completion of document production" and moving the fact discovery cut-off to January 17, 2011. (ECF No. 335.)

Since July 29, 2011, Defendants and JPMC have produced over 14.6 million pages of documents, excluding hard copy loan documents made available for review in Monroe, Louisiana and San Francisco, California, that, unlike many of the previously produced materials, are directly relevant to the litigation of this case. On September 12, 2011, the last day to produce

¹ In November 2008, the United States Senate Permanent Subcommittee on Investigations (the "Senate Subcommittee") initiated an investigation into some of the key causes of the 2008 financial crisis. As part of the investigation, the Senate Subcommittee used WMB as a case study in its examination of the events and actions that led to the 2008 financial crisis. Of the 1.5 million documents produced by Defendants and JPMC in this action, many were previously produced in response to Senate Subcommittee subpoenas and at least half do not pertain to this case. *See* Declaration of Anne L. Box filed concurrently herewith ("Box Decl."), ¶2.

documents, Defendants and JPMC notified Plaintiffs by letter² of, among other things, the following production of additional documents:

WCC's Document Production

- Documents found during the search of the WCC shared drive
- 203 boxes of archived hard copy documents available for inspection in San Francisco, California

JPMC's Document Production

- Approximately 190 boxes of WMB hard copy documents available for review in San Francisco, California³
- Approximately 9,000⁴ hard copy loan origination files available for review in Monroe, Louisiana⁵

Defendants have failed to provide any explanation as to why they waited until the eleventh hour to inform Plaintiffs of the existence of the hard copy documents in Louisiana and California. Moreover, key documents, including servicing files and over 14,000 electronic files, remain unproduced.

To date, Defendants and JPMC have produced over 26 million pages of documents, not including hard copy documents located in San Francisco and the approximately 2.7 to 4.5 million pages of loan documents recently made available for review in Monroe, Louisiana. *See* Box Decl., ¶3. Many of these documents were produced after the initial July 29, 2011 cutoff, and they relate to witnesses who Plaintiffs have determined need to be deposed. A thorough review

² *See* Box Decl., Ex. A.

³ *Id.*

⁴ Although Mr. Pernick states in his September 12, 2011 letter that there are 4,000 loan files, in actuality, the number is 9,000. *See* Box Decl., ¶3 and Ex. C.

⁵ The 9,000 loan files made available for review in Monroe, Louisiana, many of which pertain to the collateral loans underlying the securities in this case, were only coordinated for an initial cursory review on December 7, 2011, in order to determine the resources needed to conduct a thorough review.

1 of these documents is obviously necessary prior to taking these depositions. Furthermore,
 2 Defendants and JPMC have withheld approximately 78,250 documents on the basis of privilege.
 3 And of these 78,250 documents withheld for privilege, approximately 4,000 of those relate to
 4 Defendant Richard Careaga, a fact that has necessitated the postponement of Mr. Careaga's
 5 deposition while the parties attempt to work through the privilege issues.

6 To date, nine percipient witnesses have been deposed by Plaintiffs and 17 other
 7 depositions have taken place. An additional 17 depositions are scheduled to be conducted from
 8 the date of this motion through January 18, 2012, and under the current schedule, many of these
 9 depositions will be double or triple-tracked. As a result, important information gleaned in one
 10 deposition will not be available for use in the other currently scheduled depositions.⁶

11 Given the number of documents produced since July 29, 2011 which are likely relevant
 12 to the upcoming depositions, Plaintiffs believe good cause exists for the Court to amend the
 13 current scheduling order. Good cause is also present as a result of the voluminous privilege logs
 14 produced by Defendants and JPMC on October 25 and 26, 2011, respectively, and the fact that
 15 receiving the bulk of the documents produced so late in the discovery period has significantly
 16 hampered Plaintiffs' efforts to determine what, if any, additional discovery must be done. In
 17 short, Plaintiffs should not be prejudiced by the production of approximately 14.6 million pages⁷
 18 of documents after the conclusion of the Court's initial July 29, 2011 discovery deadline.

19 Accordingly, pursuant to Rule 16 of the Federal Rules of Civil Procedure, Plaintiffs
 20 respectfully request that the Court continue the fact discovery cut-off 76 days – until April 2,
 21 2012. Granting Plaintiffs' request for additional time will allow them the opportunity to review

22 ⁶ For example, on January 10, 2012, Defendant Fortunato is scheduled to be deposed in
 23 New York City, while the deposition of James Tiegen is scheduled to occur in Florida. On
 24 January 13, 2012, Donald Wilhelm is scheduled to be deposed in Seattle, Washington, Diane
 25 Novak is scheduled to be deposed in Long Beach, California, and third party J.B. Zamora is
 scheduled to be deposed in Greensboro, North Carolina.

⁷ The 14.6 million does not include the hard copy documents located in San Francisco,
 California and Monroe, Louisiana.

1 the documents fully and to complete the remainder of the depositions in a thorough, orderly
 2 manner. Additionally, given the volume of materials placed on the privilege logs, Plaintiffs
 3 would then have time to challenge documents Defendants and JPMC have withheld on grounds
 4 of privilege prior to the completion of discovery and the remaining depositions.⁸ Finally, as
 5 discussed below, good cause exists for granting this motion because Plaintiffs have diligently
 6 pursued this action.

7 For the foregoing reasons, Plaintiffs respectfully request that the Court amend the
 8 Scheduling Order to extend the close of fact discovery by 76 days, until April 2, 2012. Plaintiffs
 9 do not seek in any way to disturb the Court's September 17, 2012 trial date.

10 **II. LEGAL AUTHORITY**

11 Rule 16 of the Federal Rules of Civil Procedure governs deadlines and dates set by the
 12 court. A scheduling order controls the subsequent course of an action unless it is modified by the
 13 court, Fed. R. Civ. P. 16(e); *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir.
 14 1992), and cannot be modified except "upon a showing of good cause." Fed. R. Civ. P. 16(b);
 15 *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002). Rule 16(b)'s
 16 good cause standard primarily considers the diligence of the party seeking the amendment, and
 17 the court may modify the scheduling order if it cannot reasonably be met despite the diligence of
 18 the party seeking the extension. *Johnson*, 975 F.2d at 609. A party demonstrates good cause for
 19 the modification of a scheduling order by showing that, even with the exercise of due diligence,
 20 it was unable to meet the timetable set forth in the order. *Zivkovic*, 302 F.3d at 1087. Although
 21 the existence or degree of prejudice to the party opposing the modification might supply
 22 additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons
 23 for seeking modification. *Johnson*, 975 F.2d at 609. The decision to modify a scheduling order

24
 25 ⁸ Prior to bringing this motion, Plaintiffs conferred with Defendants and were unable to
 reach an agreement as to the extension of the fact discovery cut-off. Defendants proposed an
 agreed extension to February 10, 2012.

1 is within the broad discretion of the district court. *Id.* at 607; *Miller v. Safeco Title Ins. Co.*, 758
 2 F.2d 364, 369 (9th Cir. 1985). However, “[i]n general, if the party seeking relief can show that
 3 the deadlines cannot reasonably be met despite the party's diligence, relief may be given.”
 4 Wright, Miller & Kane, *FEDERAL PRACTICE & PROCEDURE* §1522.2 (3d ed. 2011).

5 **III. ARGUMENT**

6 **A. Good Cause Exists for the Modification of the Scheduling Order**

7 Pursuant to the Scheduling Order, the original deadline for document production to be
 8 “substantially complete” in this case was July 29, 2011. On July 28, 2011, the day before that
 9 deadline, Defendants filed their motion to extend the document production cut-off, which the
 10 Court granted in part, moving the deadline to September 12, 2011. Pursuant to that motion, the
 11 Court extended the deadline for fact discovery cut-off from December 1, 2011 to January 17,
 12 2012.

13 Plaintiffs have worked diligently to comply with the January 17, 2012 fact discovery
 14 deadline. Specifically, Plaintiffs have reviewed documents obtained from Defendants, JPMC,
 15 and a myriad of non-parties, taken the depositions of Defendants’ expert, Christopher James,
 16 defended the depositions of the Plaintiffs’ employees and two experts, Scott Hakala and Anne
 17 Zissu, prepared for and attended the depositions of Plaintiffs’ financial advisors, taken a 30(b)(6)
 18 deposition, and taken nine 30(b)(1) depositions. Despite Plaintiffs’ diligence, they have been
 19 unable to complete their review of the documents produced given the timing and sheer volume of
 20 the productions. Indeed, although this litigation has been in discovery for over 12 months, over
 21 half of the documents produced by Defendants and JPMC in this matter were produced *after*
 22 **July 29, 2011** – many of which were produced days prior to the Court’s cut-off.

23 As of July 29, 2011, Defendants and JPMC had produced over 11 million pages of
 24 documents. Since then, Defendants and JPMC have produced, at a minimum, 17 million pages
 25 to Plaintiffs, which included: (a) over eight million pages of electronic loan files; (b) 9,000 files,

1 each file consisting of 300 – 500 pages (2.7 million – 4.5 million pages total) of paper loan
 2 documents made available for on-site review in Monroe, Louisiana;⁹ and (c) approximately 400
 3 boxes of documents (the page count is unavailable) made available by Defendants and JPMC to
 4 Plaintiffs for an on-site review in San Francisco.¹⁰

5 With respect to the 9,000 loan files Defendants have made available for review in
 6 Monroe, Louisiana, Plaintiffs were only notified of the existence of this massive paper
 7 production, which requires on-site review, in a letter from Defendants dated September 12, 2011
 8 – the same day as the amended deadline for completion of substantial production. *See* Box
 9 Decl., Ex. A. While Plaintiffs have committed considerable resources to, and have completed
 10 review of, the on-site documents located in San Francisco, commencing review of the larger and
 11 more significant production of paper loan files located in Monroe, Louisiana will not occur until
 12 mid-December at the earliest.

13 Moreover, a considerable amount of responsive documents still remain unproduced by
 14 Defendants and JPMC, even at this late stage of the litigation, including servicing files for the
 15 WaMu loans which made up the pools at issue and the balance of the electronic loan files in the
 16 possession of JPMC. Furthermore, Plaintiffs have only received a portion of the documents for
 17 which Defendant Careaga, an attorney, was the custodian. Defendants marked the majority of
 18 documents related to Mr. Careaga privileged and recorded these documents on privilege logs that
 19 WCC produced on October 25, 2011, and JPMC produced on October 26, 2011. *See* Box Decl.,

20 ⁹ From the initial cursory review conducted on December 7 – 8, 2011, it appears the loan
 21 files contain the following documents relevant to this litigation: identification verification;
 22 employment verification; loan application; appraisal documentation; credit report; loan approval
 report; exception documentation; income verification; and collateral valuation reports.

23 ¹⁰ On September 26 – 30 and October 17 – 19, 2011, five attorneys from local and Lead
 24 Counsel's firms traveled to San Francisco to review paper loan files made available by
 25 Defendants and JPMC. Plaintiffs' counsel isolated approximately 12,000 pages, out of the
 hundreds of thousands reviewed, and requested copies of these documents from Defendants.
 Despite the relatively low volume of relevant documents which Plaintiffs requested be produced,
 Defendants delayed production of this isolated set for almost an entire month and Plaintiffs did
 not receive them until November 16, 2011. *See* Box Decl., ¶4.

1 Ex. B. Plaintiffs believe that Mr. Careaga's documents are highly relevant due to the fact that
 2 Mr. Careaga is a defendant in this matter, and they further believe that he was acting in a
 3 business, rather than a legal, capacity when he created or received many of these documents.
 4 Plaintiffs are currently working with Defendants to resolve this issue, but it may require Court
 5 intervention, and, at a minimum, it has forced Plaintiffs to postpone Mr. Careaga's deposition.

6 It is clear that the majority of Defendants' production occurred after the original
 7 deadline and a significant amount of production occurred within weeks, and in large part on the
 8 September 12 revised deadline. Even using one of the most advanced online document review
 9 systems, Relativity, and using searches tailored to identify the most important and potentially
 10 relevant documents, a large portion of these documents remain unreviewed by Plaintiffs.
 11 Therefore, Plaintiffs require additional time to analyze the documents sufficiently before
 12 conducting the remaining necessary depositions. As an example, the deposition of David Beck,
 13 the former Executive Vice-President of Capital Markets,¹¹ originally scheduled for December 13,
 14 2011, has now been postponed until January 18, 2012, due to the fact that Plaintiffs must review
 15 over 5,000 documents in preparation for his deposition – many of which were produced on or
 16 near the Court's September 12 deadline.

17 Based on information uncovered in the completed depositions, as well as information
 18 contained in recently produced documents, Plaintiffs believe that they will need to conduct, at
 19 minimum, nine additional depositions prior to the close of fact discovery. This need for
 20 additional depositions is good cause to extend the discovery cut-off. *See E.E.O.C. v. Bonneville*
 21 *Hot Springs, Inc.*, No. 07-CV-5321, 2008 WL 3891272 (W.D. Wash. Aug. 19, 2008) (finding
 22 need to take additional depositions was sufficient good cause in granting motion to extend close
 23 of fact discovery); *Dos Santos v. Borough of Flemington*, No. 10-1348, 2011 WL 4962383
 24 (S.D.N.Y. Oct. 18, 2011) (granting motion to extend discovery deadline to complete

25 ¹¹ The President of WCC during the relevant time period, Tim Maimone, reported to Mr. Beck.

depositions). Notably, one of the key witnesses Plaintiffs are seeking to depose, Hugh Boyle, now resides in the Barbados.¹² As such, Mr. Boyle must be served through the Hague Service Convention, a process that takes considerable time and effort.

Moreover, given the complicated nature of the case, the geographic diversity of the parties and non-parties,¹³ the massive volume of documents, and the upcoming holidays, the upcoming and yet to be scheduled depositions will entail significant travel and coordination that cannot be done within the current timeframe.

It is also important to recognize that Plaintiffs have prosecuted this action in a diligent manner. In addition to the massive effort devoted to obtaining and reviewing documents, Plaintiffs have taken, defended, or participated in numerous depositions. The following table depicts depositions already conducted in this matter and the remaining depositions that must be taken:

Deponent	Proposed Date	Proposed Location	Status	Category
Mario Rodriguez	April 26, 2011	New York, NY	Deposed	Boilermakers' 30(b)(6)
Enrique Ubarri	May 3, 2011	New York, NY	Deposed	Doral's 30(b)(6)
Marangal Domingo	May 4, 2011	New York, NY	Deposed	Doral's 30(b)(6)
Anne Zissu	May 6, 2011	New York, NY	Deposed	Plaintiffs' Expert Witness
John Gallagher	May 10, 2011	Chicago, IL	Deposed	Policemen's 30(b)(6)
Scott Hakala	May 12, 2011	New York, NY	Deposed	Plaintiffs' Expert Witness
Paul Erlendson	May 27, 2011	San Francisco,	Deposed	30(b)(1)

¹² Mr. Boyle's deposition is necessary given that in 2005 he was a Division Executive in Corporate Counterparty Risk, reporting to Jim Vanasek, the Chief Enterprise Risk Officer for WaMu. During the relevant time period, 2006-2007, Mr. Boyle became the Chief Credit Officer and reported to Ronald Cathcart, the Chief Enterprise Risk Officer for Enterprise Risk Management. Significantly, Mr. Boyle oversaw Cynthia Abercrombie in this position, and Ms. Abercrombie cannot be deposed at this time as the result of having recently suffered a stroke. *See* Box Decl., ¶5.

¹³ Depositions have been taken or are anticipated to take place in, among other places, Seattle, Dallas, Long Beach, San Francisco, New York, Miami, Kansas City, Los Angeles, Greensboro, Barbados and Chicago.

Deponent	Proposed Date	Proposed Location	Status	Category
		CA		
John Van Tassel	June 1, 2011	Chicago, IL	Deposed	30(b)(1)
David Steele	June 2, 2011	San Francisco, CA	Deposed	30(b)(1)
Joanna Karger	June 3, 2011	San Francisco, CA	Deposed	30(b)(1)
Maulik Bhansali	June 15, 2011	San Francisco, CA	Deposed	30(b)(1)
Christopher James	August 18, 2011	New York, NY	Deposed	Defendants' Expert Witness
Helaine Hebble	September 14, 2011	New York, NY	Deposed	WCC's 30(b)(6)
John Drastal	September 20, 2011	New York, NY	Deposed	30(b)(1)
Mark Brown	October 4, 2011	Chicago, IL	Deposed	30(b)(1)
Michael Aaknes	October 5, 2011	Seattle, WA	Deposed	30(b)(1)
Samuel Kunz	November 4, 2011	Chicago, IL	Deposed	Policemen's 30(b)(6)
Timothy Maimone	November 14, 2011	Seattle, WA	Deposed	30(b)(1)
Juanita Gephardt	November 16, 2011	Seattle, WA	Deposed	30(b)(1)
Rolland Jurgens	November 18, 2011	San Francisco, CA	Deposed	30(b)(1)
Cyndy DeKeyser	November 29, 2011	Kansas City, KS	Deposed	30(b)(1)
Richard Calcara	November 29, 2011	Kansas City, KS	Deposed	30(b)(1)
Vince Varca	November 30, 2011	New York, NY	Deposed	30(b)(1)
Thomas Lehmann	December 1, 2011	Chicago, IL	Deposed	30(b)(1)
Michael Coyne	December 6, 2011	New York, NY	Deposed	30(b)(1)
Marangal Domingo	December 13, 2011	Los Angeles, CA	Pending	30(b)(1)
Megan Davidson	December 15, 2011	Los Angeles, CA	Pending	30(b)(1)
Mark Hillis	December 21, 2011	Dallas, TX	Pending	30(b)(1)

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1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. 206.682.5600 • FAX 206.682.2992

Deponent	Proposed Date	Proposed Location	Status	Category
Melissa Martinez	January 5, 2012	Los Angeles, CA	Pending	30(b)(1)
James Tiegen	January 10, 2012	Miami, FL	Pending	30(b)(1)
Steven Fortunato	January 10, 2012	New York, NY	Pending	30(b)(1)
Diane Novak	January 13, 2012	Long Beach, CA	Pending	30(b)(1)
Donald Wilhelm	January 13, 2012	Seattle, WA	Pending	30(b)(1)
Jose B. Zamora	January 13, 2012	Greensboro, NC	Pending	30(b)(1)
David Beck	January 18, 2012	New York, NY	Pending	30(b)(1)
Cliff Rossi	Pending	Pending	Pending	30(b)(1)
David Schneider	Pending	Pending	Pending	30(b)(1)
Glenn Wakeman	Pending	Pending	Pending	30(b)(1)
Hugh Boyle	Pending	Pending	Pending	30(b)(1)
Kerry Killinger	Pending	Pending	Pending	30(b)(1)
Richard Careaga	Pending	Pending	Pending	30(b)(1)
Steve Rotella	Pending	Pending	Pending	30(b)(1)

Finally, without an extension, Plaintiffs will have little, or no, opportunity to seek follow-up discovery concerning any areas in which Defendants' production proves deficient or in any additional areas newly revealed during the course of deposition testimony. An extension of the fact discovery deadline is, therefore, critical to the effective litigation of this case. Plaintiffs strongly believe that an extension of two and a half months, until April 2, 2012, will allow the parties to complete the fact discovery process in an efficient manner, without further requests for extensions.

B. The Modification Will Not Result in Prejudice to Defendants

Extending fact discovery in this case will not unduly delay the action and Defendants will not be prejudiced by the modification as the trial date has not changed. *See Lisker v. City of Los Angeles*, No. CV 09-09374, 2011 WL 3420665, at *1 (C.D. Cal. Aug. 4, 2011) (citing 6A

Wright, *et al.*, FEDERAL PRACTICE AND PROCEDURE §1522.2 (3d ed. 1990)). Good cause exists for an extension of the deadline for close of fact discovery and is not burdensome to Defendants, given that the trial date will remain intact. *See Lam v. City and County of San Francisco*, No. 08-CV-4702, 2011 WL 4915812 (N.D. Cal. Oct. 17, 2011) (granting plaintiff's request for extension of close of fact discovery where good cause outweighed alleged prejudice to defendants). Moreover, the requested extension will not disturb the Court's September 17, 2012 trial date. The proposed schedule would still allow for five and a half months between the proposed close of discovery on April 2, 2012 and the September 17, 2012 trial. Plaintiffs believe that this is sufficient time to prepare and file dispositive pre-trial motions and responses to those motions.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court amend the October 29, 2010 Scheduling Order, to extend the deadline for close of fact discovery to April 2, 2012, and to make additional corresponding changes outlined in Plaintiffs' Proposed Schedule attached as Ex. D to the Box Decl.

DATED this 8th day of December, 2011.

TOUSLEY BRAIN STEPHENS PLLC

/s/ Kim D. Stephens

Kim D. Stephens, WSBA #11984
 Janissa A. Strabuk, WSBA #21827
 1700 Seventh Avenue, Suite 2200
 Seattle, WA 98101
 Telephone: (206) 682-5600
 Facsimile: (206) 682-2992
 Email: kstephens@tousley.com
 jstrabuk@tousley.com

Liaison Counsel for Plaintiffs and the Class

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TOUSLEY BRAIN STEPHENS PLLC
 1700 Seventh Avenue, Suite 2200
 Seattle, Washington 98101-1332
 TEL. 206.682.5600 • FAX 206.682.2992

**COHEN MILSTEIN SELLERS &
TOLL PLLC**

Steven J. Toll
Julie Goldsmith Reiser
Joshua S. Devore (admitted *pro hac vice*)
S. Douglas Bunch (admitted *pro hac vice*)
1100 New York Avenue, N.W.
Suite 500, West Tower
Washington, DC 20005
Telephone: (202) 408-4600
Facsimile: (202) 408-4699
Email: stoll@cohenmilstein.com
jreiser@cohenmilstein.com
jdevore@cohenmilstein.com
dbunch@cohenmilstein.com

Joel P. Laitman (admitted *pro hac vice*)
Christopher Lometti (admitted *pro hac vice*)
Daniel B. Rehns (admitted *pro hac vice*)
150 East 52nd Street, Thirtieth Floor
New York, NY 10022
Telephone: (212) 838-7797
Facsimile: (212) 838-7745
Email: jlaitman@cohenmilstein.com
clometti@cohenmilstain.com
drehns@cohenmilstein.com

SCOTT+SCOTT LLP

Anne L. Box (admitted *pro hac vice*)
Hal D. Cunningham (admitted *pro hac vice*)
707 Broadway, Suite 1000
San Diego, CA 92101
Telephone: (619) 233-4565
Facsimile: (619) 233-0508
Email: abox@scott-scott.com
hcunningham@scott-scott.com

Joseph P. Guglielmo (admitted *pro hac vice*)
500 Fifth Avenue, 40th Floor
New York, NY 10110
Telephone: (212) 223-6444
Facsimile: (212) 223-6334
Email: jguglielmo@scott-scott.com

Lead Counsel for the Class

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TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. 206.682.5600 • FAX 206.682.2992

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2011, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List, and I hereby certify that I caused the foregoing document or paper to be mailed via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 8, 2011.

/s/ Kim D. Stephens
Kim D. Stephens, WSBA #11984
TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, WA 98101
Telephone: (206) 682-5600
Facsimile: (206) 682-2992
Email: kstephens@tousley.com

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TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
TEL. 206.682.5600 • FAX 206.682.2992